



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 493 OF 2009

OILFIELD LOGISTICS & SERVICES AFRICA LTD.....PLAINTIFF

VERSUS

GREATWALL DRILLING COMPANY LTD.....DEFENDANT

RULING

1. The Plaintiff's **chamber summons dated 16th August 2011** is made under **section 7(1)** of the **Arbitration Act, Cap 49 (the Act)** and **Rule 2 of the Arbitration Rules, 1997 (the Rules)**. It seeks the main orders –

- i. That the order of stay issued by Justice Dulu on 26/6/2010 be discharged, varied, vacated or set aside.
- ii. That the court be pleased to make an order superseding the arbitration envisaged by the parties.
- iii. That the court be pleased to set down the suit for hearing and determination.

2. The application is premised upon the grounds that -

- i. Despite the Plaintiff's best endeavor the arbitration as envisaged in arbitration agreement between the parties, arbitration has failed to commence and has remained impossible and untenable due to the prohibitive nature of the arbitration costs involved.
- ii. The window of justice will be shut on the Plaintiff if the said stay order is not set aside, vacated or otherwise varied and the suit herein heard on its merits by this court.
- iii. The continued delay in the determination of this matter is greatly prejudicing the Plaintiff while no prejudice will be occasioned to the Defendant if this matter is heard by this court.
- iv. It is in the interests of justice that this matter is heard and determined on merits by this court.
- v. The court has jurisdiction to hear and determine this suit.

The application is supported by the affidavit of **Joseph Njuki Gathecha** one of the directors of the Plaintiff sworn on **16th August 2012**.

3. The Defendant has opposed the application in its **grounds of opposition dated 31st January 2012**. The point taken is that the application is incompetent, bad in law, lacks merit, misconceived and an abuse of the court process.

4. The parties filed written submissions with authorities which I have duly considered. Section 6(1) of the Act provides –

“6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies...stay the proceedings and refer the parties to arbitration unless it finds -

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

5. The parties, by their contract freely entered into, agreed that their disagreements be referred to arbitration. The Plaintiff has not applied to declare the arbitration agreement null and void, inoperative or incapable of being performed. In any case there are no grounds upon which the arbitration agreement may be so declared. High costs of arbitration *per se* cannot be such ground. That is something that the Plaintiff should have thought about before entering into the arbitration agreement.

6. Parties must be held to their bargains. The court cannot re-write parties' contracts. I am afraid this application must fail for want of merit. It is dismissed with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF JUNE 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2013